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# REPUDIATION OF CONTRACTS.

THE use of the word "repudiation" in the law of contracts is modern, and though the conduct to which this name has been applied can hardly have been confined to modern times, still it is chiefly in recent cases that the legal effect of such conduct has been considered. Indeed, it cannot be said that the courts have even as yet worked out a consistent and logical doctrine on the subject.

By repudiation of a contract is to be understood such words or actions by a contracting party as indicate that he is not going to perform his contract in the future. He may already have performed in part; part performance may already have become due from him under the contract, but not have been rendered; or the time when any performance is due from him may still be in the future. The essential element which exists in all these cases is something still to be performed in the future under the contract which, as he has made manifest, he is not going to perform. Whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial, though the word "repudiation" is more strictly appropriate to cases where an intention not to perform is manifested, irrespective of ability.

In case such repudiation of a contract is made by one contracting party, the other may frequently, at least, take one of two courses.

I.

He may elect to rescind the contract entirely. This right generally exists where there has been repudiation or a material breach of the contract, and is most commonly exercised when the aggrieved party has performed fully or in part, and wishes to recover what he has given or its value. Thus he has a right to restitution as an alternative remedy instead of compensation in damages. This choice of remedies was not allowed by the early English law,[1] and there are still many exceptions and inconsistencies in the application of the rule, which are due in part to the fact that the rule has been developed largely under cover of the fictitious declaration in *indebitatus assumpsit*, and of equally fictitious inferences that a refusal to perform a contract indicates assent to the rescission of the contract and the restoration of what has been given under it. As may be observed in other branches of the law, the English cases are more conservative than the American — less ready to accept a new general rule varying from early precedents. So that the principle stated above must be taken only with very considerable qualifications as a statement of the law of England. Indeed, that principle is directly at variance with statements of law made in recent English cases — statements which would doubtless in many classes of cases be acted on.[2] In this country, though there are exceptions to the rule, it may safely be laid down as a general principle. The following paragraphs show its applications and limitations.

If a party to a contract has paid money and the other party has wholly failed to perform on his part, restitution may be had both in England[3] and in this country.[4]

[1] The earliest cases allowing an action for restitution against a defendant guilty of breach of contract, and who might have been sued on the contract for damages, are Dutch *v.* Warren, 1 Str. 406, and Anonymous, 1 Str. 407, decided in 1721; but in the first of these decisions, though the action was in form for restitution, the plaintiff's damages were restricted to the value of what he ought to have received by the contract. No general recognition of a right to restitution as a remedy for breach of contract existed prior to decisions of Lord Mansfield and Lord Kenyon at the end of the eighteenth century.

[2] See *e. g.* James *v.* Cotton, 7 Bing. 266, 274, per Tindal, C. J.; Street *v.* Blay, 2 B. & Ad. 456, 462; Dawson *v.* Collis, 10 C. B. 523, 528.

[3] Towers *v.* Barrett, 1 T..R. 133; Giles *v.* Edwards, 7 T. R. 181; Farrer *v.* Nightingal, 2 Esp. 639; Widdle *v.* Lynam, Peake, A. C. 30; Greville *v.* Da Costa, Peake, A. C. 113; Squire *v.* Tod, 1 Camp. 293; Wilde *v.* Fort, 4 Taunt. 334; Bartlett *v.* Tuchin, 6 Taunt. 259; Gosbell *v.* Archer, 4 N. & M. 485. So in the colonies, Wrayton *v.* Naylor, 24 S. C. Canada, 295; Wolff *v.* Pickering, 12 S. C. Cape of Good Hope, 429, 432.

[4] Nash *v.* Towne, 5 Wall. 689; Lyon *v.* Annable, 4 Conn. 350; Thresher *v.* Ston-

If land has been conveyed instead of money paid, the special right given by the vendor's lien is the only right the English seller has, other than an action on the contract for damages.[1] But in this country the vendor may obtain restitution by a bill in equity.[2]

If the title to personal property has been transferred, whether under a contract of exchange[3] or sale,[4] the English law does not permit the transferrer to rescind the transaction and revest the title in himself because he has not received the promised payment. This is true even though the seller has retained possession of the property, and therefore has a vendor's lien.[5] The right of stoppage *in transitu*, although it may seem equivalent in effect to a right of rescission in the limited class of cases where it is applicable, does no more than continue the vendor's lien after the property has passed from his possession.[6] In this country, however, if the seller has not parted with possession of the goods, he is generally allowed, on default of the buyer to keep them as his own or make a resale — rights which seem necessarily to involve a rescission.[7] But if the seller

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ington Bank, 68 Conn. 201; Barr *v.* Logan, 5 Harr. (Del.) 52; Payne *v.* Pomeroy, 21 D. C. 243; Trinkle *v.* Reeves, 25 Ill. 214; German, etc. Assoc. *v.* Droge, 14 Ind. App. 691; Wilhelm *v.* Fimple, 31 Ia. 131; Doherty *v.* Dolan, 65 Me. 87; Ballou *v.* Billings, 136 Mass. 307; Dakota, etc. Co. *v.* Price, 22 Neb. 96; Weaver *v.* Bentley, 1 Caines, 47; Cockcroft *v.* Muller, 71 N. Y. 367; Glenn *v.* Rossler, 88 Hun, 74; Wilkinson *v.* Ferree, 24 Pa. 190.

[1] Dart, Vendors & Purchasers (6th ed.), 1248. It is common practice in England to insert an express stipulation allowing rescission. Dart, 178.

[2] Savannah, etc. Ry. Co. *v.* Atkinson, 94 Ga. 780; Cooper *v.* Gum, 152 Ill. 471; McClelland *v.* McClelland, 176 Ill. 83; Patterson *v.* Patterson, 81 Ia. 626; Scott's Heirs *v.* Scott, 3 B. Mon. 2; Reeder *v.* Reeder, 89 Ky. 529; Shepardson *v.* Stevens, 77 Mich. 256; Pinger *v.* Pinger, 40 Minn. 417; Pironi *v.* Corrigan, 47 N. J. Eq. 135; Michel *v.* Hallheimer, 56 Hun, 416; Wilfong *v.* Johnson, 41 W. Va. 283. If possession has been given, but no conveyance passed, ejectment or trespass will lie. McDaniel *v.* Gray, 69 Ga. 433; Graves *v.* White, 87 N. Y. 463; Clough *v.* Hosford, 6 N. H. 231; Williams *v.* Noisseux, 43 N. H. 388. See, also, Ferris *v.* Hoglan, 121 Ala. 240. Even where a conveyance had passed the vendor was allowed to treat it as null, and a conveyance to another was held effectual in Thompson *v.* Westbrook, 56 Tex. 265, and Kennedy *v.* Embry, 72 Tex. 387. But these cases were questioned in Huffman *v.* Mulkey, 78 Tex. 556, 561, and are opposed to McCardle *v.* Kennedy, 92 Ga. 198.

[3] Emanuel *v.* Dane, 3 Camp. 299; Power *v.* Wells, Cowp. 818.

[4] Greaves *v.* Ashlin, 3 Camp. 426; Martindale *v.* Smith, 1 Q. B. 389; Gillard *v.* Brittan, 8 M. & W. 575; Page *v.* Cowasjee Eduljee, L. R. 1 P. C. 127. But see the early case of Langfort *v.* Tiler, 1 Salk. 113. See, also, Sale of Goods Act, sect. 48; Chalmers, Sale of Goods Act (3d ed.), 91.

[5] Martindale *v.* Smith, 1 Q. B. 389; Page *v.* Cowasjee Eduljee, L. R. 1 P. C. 127.

[6] Benjamin, Sales, § 867; Diem *v.* Koblitz, 48 Ohio St. 41.

[7] Barr *v.* Logan, 5 Harr. (Del.) 52; Code Ga. § 3551; Bagley *v.* Findlay, 82 Ill. 524; Ames *v.* Moir, 130 Ill. 582; Cook *v.* Brandeis, 3 Metc. (Ky.) 555; Young *v.* Mertens,

has parted with both possession and title, there seems to be no authority, either in England or in this country, allowing him to bring trover or other action for the recovery of what he had transferred.[1]

If the performance rendered consists of services, there cannot ordinarily, from the nature of legal remedies, be actual restitution, but it is possible to give the equivalent in value under a common count. Since money paid may be thus recovered back, and similarly in this country land, logic would require such a remedy; and it is allowed in part, but only in part. If the plaintiff has fully performed, the only redress he has for breach of contract by the other side is damages for the breach. It is true that if the performance to which he is entitled in return is a liquidated sum of money, he may sue in *indebitatus assumpsit* and not on the special contract,[2] but the measure of damages is what he ought to have received — not the value of what he has given.[3] If, however, the plaintiff has only partly performed and has been excused from further performance by prevention or by the repudiation or abandonment of the contract by the defendant, he may recover,

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27 Md. 114, 126; Haskell *v.* Rice, 11 Gray, 240; Holland *v.* Rea, 48 Mich. 218; Warren *v.* Buckminster, 24 N. H. 336; Gordon *v.* Norris, 49 N. H. 376; Dustan *v.* McAndrew, 44 N. Y. 72; Hayden *v.* Demets, 53 N. Y. 426; Mason *v.* Decker, 72 N. Y. 595; Van Brocklen *v.* Smeallie, 140 N. Y. 70; McEachron *v.* Randles, 34 Barb. 301; McClure *v.* Williams, 5 Sneed, 718; Harvey *v.* Adams, 9 Lea, 289, 291; Rosenbaums *v.* Weeden, 18 Gratt. 785. See, also, Putnam *v.* Glidden, 159 Mass. 47. In many of these cases the question was not actually involved.

The Indian Contract Act, sect. 107, also allows resale by the lienholder, though the title has passed, and though "the buyer must bear any loss," he "is not entitled to any profit which may occur on such resale."

[1] See Benjamin, Sales, § 766; Power *v.* Wells, Cowp. 818; Emanuel *v.* Dane, 3 Camp. 299; Neal *v.* Boggan, 97 Ala. 611, and cases cited; Thompson *v.* Conover, 32 N. J. L. 466. The Indian Contract Act, sect. 121, expressly denies the right to rescind after delivery, in the absence of express stipulation.

In Dow *v.* Harkin, 67 N. H. 383, however, the plaintiff, who had assigned a patent and conveyed tools to the defendant in consideration of an executory agreement which the defendant had failed to perform, was allowed to recover the tools as well as have the assignment set aside by proceedings in equity. The court intimated that the jurisdiction of equity arose from the assignment of the patent, but that as it took jurisdiction of the case it would also act in regard to the tools.

[2] Keener, Quasi-Contracts, 300; Leake, Contracts (3d ed.), 45; Chitty, Pleadings (7th ed.), i. 358; Atkinson *v.* Bell, 8 B. & C. 277, 283; Gandall *v.* Pontigny, 1 Stark. 198; Savage *v.* Canning, Ir. R. 1 C. L. 434; Wardrop *v.* Dublin, etc. Co., Ir. R. 8 C. L. 295; Shepard *v.* Mills, 173 Ill. 223; Southern Bldg. Ass'n *v.* Price, 88 Md. 155; Nicol *v.* Fitch, 115 Mich. 15.

[3] Keener, Quasi-Contracts, 301; Leake, Contracts (3d ed.), 45; Barnett *v.* Sweringen, 77 Mo. App. 64, 71, and cases cited; Porter *v.* Dunn, 61 Hun, 310 (S. C. 131 N. Y. 314); and see cases in the preceding note.

either in England or America, the value of what he has given,[1] though such a remedy is no more necessary than where he has fully performed, since in both cases alike the plaintiff has an effectual remedy, in an action on the contract for damages. In some jurisdictions, if a price is fixed by the contract, that is made the conclusive test of the value of the services rendered.[2] More frequently, however, the plaintiff is allowed to recover the real value of the services though in excess of the contract price.[3] The latter rule seems more in accordance with the theory on which the right of action must be based — that the contract is treated as rescinded and the plaintiff restored to his original position as nearly as possible.

While it is ordinarily the case that a party who seeks to rescind or avoid a contract because of a breach of contract or repudiation by the other party has performed at least in part and desires restitution of what he has given or its value, yet it seems to follow that the same course is open to one who has not performed at all. Such a person will not wish ordinarily to avoid the contract altogether, because that course would deprive him of any right of action whatever. He could seek neither restitution, because he had given nothing, nor compensation in damages for breach of the contract, because he had put an end to the promise on which he must sue. Nevertheless, there are many cases where the injured party is content merely to terminate his legal relations with the other party to the contract without more. That he may do this is perhaps

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[1] Mayor *v.* Pyne, 3 Bing. 285; Planchè *v.* Colburn, 8 Bing. 14; Clay *v.* Yates, 1 H. & N. 73; Bartholomew *v.* Markwick, 15 C. B. (N. S.) 711; M'Connell *v.* Kilgallen, 2 L. R. Ir. 119. But the right was denied as recently as 1802 in Hulle *v.* Heightman, 2 East, 145. Many American cases are collected *infra*, p. 325, *n.*

[2] Chicago *v.* Sexton, 115 Ill. 230; Keeler *v.* Clifford, 165 Ill. 544, 548; Chicago Training School *v.* Davies, 64 Ill. App. 503; Western *v.* Sharp, 14 B. Mon. 177; Doolittle *v.* McCullough, 12 Ohio St. 360 (much qualified by Wellston Coal Co. *v.* Franklin Paper Co., 57 Ohio St. 182); Harlow *v.* Beaver Falls Borough, 188 Pa. 263, 266; Noyes *v.* Pugin, 2 Wash. 653.

[3] United States *v.* Behan, 110 U. S. 338, 345; Clover *v.* Gottlieb, 50 La. Ann. 568; Rodemer *v.* Hazlehurst, 9 Gill, 288; Fitzgerald *v.* Allen, 128 Mass. 232; Kearney *v.* Doyle, 22 Mich. 294; Hemminger *v.* Western Assurance Co., 95 Mich. 355; McCullough *v.* Baker, 47 Mo. 401; Ehrlich *v.* Ætna L. I. Co., 88 Mo. 249, 257; Clark *v.* Manchester, 51 N. H. 594; Clark *v.* Mayor, 4 N. Y. 338; Wellston Coal Co. *v.* Franklin Paper Co., 57 Ohio St. 182; Derby *v.* Johnson, 21 Vt. 17; Chamberlin *v.* Scott, 33 Vt. 80.

But in these jurisdictions the prices fixed in the contract are evidence (though not conclusive) of the value of the work. Monarch *v.* Board of School Fund, 49 La. Ann. 991; Walsh *v.* Jenvey, 85 Md. 240; Fitzgerald *v.* Allen, 128 Mass. 232, 234; Eakright *v.* Torrent, 105 Mich. 294.

intimated by Parke, B., in Phillpotts *v.* Evans;[1] it is expressly stated by Crompton, J., in Hochster *v.* De La Tour,[2] where the repudiation preceded the time for performance by either party. It was so decided in King *v.* Faist.[3] There the plaintiff had stated he would not perform unless the defendant gave a guarantee which the contract did not require; whereupon the defendants wrote that they would not perform, and they did not. The plaintiffs sued for this failure to perform, but the court held it justified, saying: "Before the defendants were in default under the substituted contract, or had notified him of an intention not to perform it, he himself repudiated it by notifying them that he would not perform it on his part, and thus gave them the right to rescind the contract."[4] This right may become of great importance if the contract while it exists operates as a threatened liability or a cloud on title. Thus if a contract for the sale of real estate is recorded, the owner has no longer a salable title, and if the purchaser fails to carry out his agreement, the owner, to regain a clear title to his land, will desire the rescission of the contract. In order that there may be recorded evidence of this a court of equity will decree the rescission and cancellation of such a contract.[5] So one who has given negotiable paper in return for a promise which has been broken is entitled to proceed affirmatively for the rescission of the contract and the surrender of the negotiable paper, lest it should be negotiated by the holder to a *bona fide* purchaser for value without notice, to whom the maker would be liable.[6]

There seems to be no doubt that repudiation without any actual failure to perform the contract is enough to give rise to the right. This point is covered by the remark of Crompton, J., just referred to. So, in Ballou *v.* Billings,[7] the court say: "Such a repudiation did more than excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end.

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[1] 5 M. & W. 475, 477. See, also, Grimaldi *v.* White, 4 Esp. 95.

[2] 2 E. & B. 678, 685. "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract."

[3] 161 Mass. 449.

[4] Ib. at p. 457. See, also, Howe. *v.* Smith, 27 Ch. D. 89, 105; Munsey *v.* Butterfield, 133 Mass. 492; Warters *v.* Herring, 2 Jones L. (N. C.) 46.

[5] Howe *v.* Hutchison, 105 Ill. 501; Nelson *v.* Hanson, 45 Minn. 543; Kirby *v.* Harrison, 2 Ohio St. 326.

[6] See Randolph on Commercial Paper (2d ed.), §§ 1686, 1687; Campbell Printing Press Co. *v.* Marsh, 20 Colo. 22; Duggar *v.* Dempsey, 13 Wash. 396.

[7] 136 Mass. 307, 308.

It had this effect, even if, for want of a tender, the time for performance on the defendants' part had not come, and therefore it did not amount to breach of covenant." And again, "It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach."[1] But question is more likely to be made whether breach of contract without repudiation justifies rescission than whether repudiation without actual breach is sufficient. There are many expressions, chiefly in English cases, which seem to mean that repudiation, or abandonment of the contract is essential to give rise to the right of rescission. Thus, in Ehrensperger *v.* Anderson, Parke, B., said, "In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying 'I rescind this contract,' . . . a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'"[2] In accordance with this doctrine it was held that failure by the defendant to remit a bill of exchange did not justify the plaintiff to treat the contract as rescinded and sue in money had and received for restitution of what the defendant had received. In Freeth *v.* Burr,[3] the court, and particularly Lord Coleridge, laid stress on the question whether the breach of contract amounted to an "abandonment of the contract or a refusal to perform it on the part of the person so making default;" and in Mersey Steel and Iron Co. *v.* Naylor, the Earl of Selborne, citing Lord Coleridge's statement, expressed the same view even more explicitly.[4] This doctrine, though perhaps it is that of the English

[1] P. 309. See, also, Drake *v.* Goree, 22 Ala. 409; Elder *v.* Chapman, 176 Ill. 142; Festing *v.* Hunt, 6 Manitoba, 381.

[2] 3 Ex. 148, 158. This is quoted in Keener on Quasi-Contracts, 304, as a correct exposition of the law. Similar expressions may be found in Fay *v.* Oliver, 20 Vt. 118, 122.

[3] L. R. 9 C. P. 208, 214. Reliance was placed on earlier expressions in Withers *v.* Reynolds, 2 B. & Ad. 882, and Jonassohn *v.* Young, 4 B. & S. 296. See, also, the language of Coleridge, J., in Franklin *v.* Miller, 4 A. & E. 599.

[4] 9 App. Cas. 434, 438. In both Freeth *v.* Burr and Mersey Steel and Iron Co. *v.* Naylor, the question was not directly as to the right of rescission, but as to the right of a party to maintain an action on the express contract when himself in default. In both those cases such an action was held maintainable, in part at least because the default relied on did not show an intention to abandon the whole contract. It seems clear, however, that a default which is not sufficient to warrant the other party in refusing to perform his promise, and is no answer to an action on that promise, will not

law to-day,[1] must be regarded as erroneous in principle and unfortunate in practice. It seems to be based in large part on the notion that, in order to justify such a rescission of the contract, mutual assent of the parties must be established — an offer by the party in default accepted by the other party.[2] In almost any case this

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entitle him to treat the contract as rescinded. These cases may, therefore, be cited in this connection. It is without the scope of the present article to criticise fully the doctrine so far as it relates to the sufficiency of the plaintiff's non-performance without repudiation or abandonment of the contract as a defence to an action upon it, but it may be briefly pointed out that if a party to a contract fails to perform, it is immaterial to the other party whether the default is wilful or negligent, and if the contract has been substantially broken already it does not help matters that the wrong-doer has the best intentions for the future. Lord Blackburn, in commenting on the Earl of Selborne's statement, might have put more strongly than he did the implied criticism of its adequacy: "That is, I will not say the only ground of defence, but a sufficient ground of defence." 9 App. Cas. 434, 443.

In some American cases, also, it has been said that mere breach of contract does not justify rescission unless an intention is manifested to be no longer bound by the contract, or unless the wrong-doer has prevented performance by the other party. Wright *v.* Haskell, 45 Me. 489 (see, also, Dixon *v.* Fridette, 81 Me. 122); Blackburn *v.* Reilly, 47 N. J. L. 290; Trotter *v.* Heckscher, 40 N. J. Eq. 612; Graves *v.* White, 87 N. Y. 463; Hubbell *v.* Pacific Mut. Ins. Co., 100 N. Y. 41, 47 (comp. Bogardus *v.* N. Y. Life Ins. Co. 101 N. Y. 328); Suber *v.* Pullin, 1 S. C. 273. But it is to be noticed that it is much easier to find cases where such expressions are used, than it is to find cases where it was actually held that a breach so material as to make the partial performance of the contract different in substance from the performance promised was insufficient ground for rescission because no intention was manifested to refuse absolutely to perform in the future. Thus, in spite of the remarks in some New York cases, it was held in Welsh *v.* Gossler, 89 N. Y. 540, that a contract to ship in May or June might be rescinded for non-performance of this requirement, though there was so far from an absolute repudiation that shipment was actually made in July and the cargo tendered. This was followed in Hill *v.* Blake 97 N. Y. 216. See, also, Mansfield *v.* N. Y. Central R. R. Co., 102 N. Y. 205.

[1] See, in addition to the cases cited in the previous note, Cornwall *v.* Henson, L. R. [1900] 2 Ch. 298; *In re* Phœnix, etc. Co., 4 Ch. D. 108; Bloomer *v.* Bernstein, L. R. 9 C. P. 588. There are strong expressions to the same effect in Colonial decisions. In Bradley *v.* Bertoumieux, 17 Victorian L. R. 144, 147, it is said: "A contract broken is not a contract rescinded, and unless one of the parties to the contract clearly intimates his intention not to perform his contract, or his inability to perform it, the other party is not at liberty to rescind the contract." So in Oaten *v.* Stanley, 19 Victorian L. R. 553, 555, "The point is whether the person who committed the breach meant to abandon the contract." And see, to similar effect, Prendergast *v.* Lee, 6 Victorian L. R. (Law) 411; Hacker *v.* Australian, etc. Co., 17 Victorian L. R. 376; Midland Ry. Co. *v.* Ontario Rolling Mills, 10 Ont. App. 677. See, however, Muston *v.* Blake, 11 S. C. New South Wales, 92.

[2] Thus, Coleridge, J., in Franklin *v.* Miller, 4 A. & E. 599, says: "The rule is that, in rescinding, as in making a contract, both parties must concur," and, "therefore, the refusal which is to authorize the rescission of the contract must be an unqualified one." See, also, the reasoning of Lord Esher in Johnstone *v.* Milling, 16 Q. B. D. 460, 467. And in an American case it is said: "Where one of the contracting parties absolutely

can be established only by resorting to the baldest fiction. As matter of theory a man who repudiates a contract no more than one who negligently breaks it offers to rescind it, and if he did, his offer could only be construed as expressing a willingness to drop matters as they stood at the time, not with the addition imposed by the court of making restitution of what he has received.[1] And as a practical question the only important consideration is how defective the performance of a contracting party has been or is likely to be, not whether it was negligence or wilfulness on his part that led him to break his promise. In truth rescission is imposed *in invitum* by the law at the option of the injured party, and it should be, and in general is, allowed not only for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as should constitute a defence to an action brought by the party in default for a refusal to proceed with the contract.[2]

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refuses to perform, such refusal . . . will be regarded as equivalent to a consent on his part to a rescission of the contract, and the other contracting party may, if he choose, so treat it, rescind the contract, and if he have done anything under it, may immediately sue for compensation on a *quantum meruit*." Shaffner *v.* Killian, 7 Ill. App. 620. So in Cromwell *v.* Wilkinson, 18 Ind. 365, 370; Stevens *v.* Cushing, 1 N. H. 17, 18; Dow *v.* Harkin, 67 N. H. 383, and other cases.

[1] How inadequate any doctrine of mutual consent is to account for even the English cases may be seen from the decision in Clay *v.* Yates, 1 H. & N. 73. The plaintiff contracted to print for the defendant a second edition of a treatise with a new dedication, which had not then been written. After the treatise was printed the plaintiff discovered that the dedication which had been furnished him was libellous and refused to complete the fulfilment of the contract. He was held entitled to recover for the printing he had done. Here the defendant, so far from assenting to a rescission of the contract, demanded that it should be performed. The plaintiff recovered because the defendant had given ground for, though not assented to, the interruption of the contract.

Rescission by mutual consent is, of course, an entirely possible solution for parties to elect when they are disputing over a contract. An instance of it is to be found in Skillman Hardware Co. *v.* Davis, 53 N. J. L. 144. The court found from the conduct of the parties that there had been rescission by mutual consent. See, also, Hobbs *v.* Columbia Falls Brick Co., 157 Mass. 109. Neither party is entitled to damages in such a case without special agreement. Leake, Contracts (3d ed.), 52.

[2] Panama, etc. Co. *v.* India, etc. Co. L. R. 10 Ch. 515, 532 (*semble*); Phillips, etc. Co. *v.* Seymour, 91 U. S. 646; Farmers' L. & T. Co. *v.* Galesburg, 133 U. S. 156; Watson *v.* Ford, 93 Fed. Rep. 359; Powell *v.* Sammons, 31 Ala. 552; Ferris *v.* Hoagland, 121 Ala. 240; Porter *v.* Arrowhead Reservoir Co., 100 Cal. 500; San Francisco Bridge Co. *v.* Dumbarton Co., 119 Cal. 272; Campbell Printing Press Co. *v.* Marsh, 20 Colo. 22; Code of Georgia, § 3712; Bacon *v.* Green, 36 Fla. 325; Harrison Machine Works *v.* Miller, 29 Ill. App. 567; Wolf *v.* Schlacks, 67 Ill. App. 117; Cromwell *v.* Wilkinson, 18 Ind. 365; Anderson *v.* Haskell, 45 Ia. 45; Wernli v. Collins, 87 Ia. 548; Stahelin *v.* Sowle, 87 Mich. 124; Robson *v.* Bohn, 27 Minn. 333; Nelson *v.* Hanson, 45 Minn. 543; Gullich *v.* Alford, 61 Miss. 224; Mugan *v.* Regan, 48 Mo. App. 461;

If a contract has been partly performed by the party in default, the other party, at least if he has received any benefit from such part performance, cannot ordinarily rescind the contract according to the English law. Even though he return what he has received, it is said the parties cannot be restored to their original position, because he has had the temporary enjoyment of the property. In the leading case of Hunt *v.* Silk,[1] the plaintiff, who sought to recover money he had paid under an agreement for a lease, because of the defendant's failure to make repairs as agreed, had had possession of the premises a few days. This was held fatal. Lord Ellenborough said: "If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account?" Hunt *v.* Silk has been consistently followed.[2] It is in accordance with this rule that a buyer is not allowed to rescind a contract for breach of warranty,[3] though there is the additional reason in the case of a warranty that it is said to be a collateral contract. In the United States the law is more liberal. It is universally agreed that rescission is not allowable unless the party seeking to rescind can and does first restore or offer to restore anything he has received under the contract,[4] but the construction of this rule is far less severe than in England. Though it is frequently said that "A contract cannot ordinarily be rescinded unless both parties can be reinstated in their original situation in

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Oliver *v.* Goetz, 125 Mo. 370; Drew *v.* Claggett, 39 N. H. 431; Foster *v.* Bartlett, 62 N. H. 617; Pattridge *v.* Gildermeister, 1 Keyes, 93; Welsh *v.* Gossler, 89 N. Y. 540; Hill *v.* Blake, 97 N. Y. 216; North Dak. Civ. Code, § 3932; Rummington *v.* Kelley, 7 Ohio, pt. 2, 97; Higby *v.* Whittaker, 8 Ohio, 198; Kirby *v.* Harrison, 2 Ohio St. 326; Oklahoma Stats. § 866; Miller *v.* Phillips, 31 Pa. 218; Greene *v.* Haley, 5 R. I. 260; Bennett *v.* Shaughnessy, 6 Utah, 273; Fletcher *v.* Cole, 23 Vt. 114; Preble *v.* Bottom, 27 Vt. 249; Meeker *v.* Johnson, 5 Wash. 718; School District *v.* Hayne, 46 Wis. 511. Many earlier decisions are cited in the cases above.

[1] 5 East, 449.

[2] Beed *v.* Blandford, 2 Y. & J. 278; Street *v.* Blay, 2 B. & Ad. 456, 464; Blackburn *v.* Smith, 2 Ex. 783. See, also, Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 451.

[3] Street *v.* Blay, 2 B. & Ad. 456; Gompertz *v.* Denton, 1 C. & M. 207; Poulton *v.* Lattimore, 9 B. & C. 259; Parsons *v.* Sexton, 4 C. B. 899; Dawson *v.* Collis, 10 C. B. 523. So provided in the Indian Contract Act, sect. 117.

[4] Code of Georgia, § 3712; Summerall *v.* Graham, 62 Ga. 729; Clover *v.* Gottlieb, 50 La. Ann. 568; Miner *v.* Bradley, 22 Pick. 457; Clark *v.* Baker, 5 Met. 452; Snow *v.* Alley, 144 Mass. 546; Gullich *v.* Alford, 61 Miss. 224; Doughten *v.* Camden Assoc., 41 N. J. Eq. 556; Gale *v.* Nixon, 6 Cow. 445; North Dak. Civ. Code, § 3934; Brown *v.* Witter, 10 Ohio, 142; Oklahoma Stats. § 868; Potter *v.* Taggart, 54 Wis. 395; 50 Am. Decisions, 674, *n.*; 74 Am. Decisions, 661, *n.*

respect of their contract. And if one party have already received benefit from the contract he cannot rescind it wholly, but is put to his action for damages," [1] or the like, yet some courts have gone very far in allowing a rescission upon restitution *in specie* of what had been given in spite of benefits derived from temporary possession.[2] Thus, in many of the states, rescission is allowed for breach of warranty.[3] The most satisfactory disposition of many cases where the plaintiff cannot, without any fault on his part, return all he has received, would be to allow the plaintiff to recover subject to a

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[1] Story, Contracts, § 977. See, also, Moore *v.* Barr, 11 Ia. 198; Burge *v.* Cedar Rapids, etc. R. R. Co., 32 Ia. 101; Stevenson *v.* Polk, 71 Ia. 278; Handforth *v.* Jackson, 150 Mass. 149; Spencer *v.* St. Clair, 57 N. H. 9, 13; Fay *v.* Oliver, 20 Vt. 118.

[2] In Ankeny *v.* Clark, 148 U. S. 345, the plaintiff was allowed to recover the full value of wheat delivered by him to the defendant, on surrendering possession of land which the defendant had contracted but failed to convey, though the plaintiff had had possession of the land for over four years, and this possession was admitted to be worth over two thousand dollars. The cases cited by the court in support of its position merely establish the point that if the suit had been reversed the vendor could not have recovered for the use and occupation of the land — a different matter. Contrary to Ankeny *v.* Clark, but not cited in that case, are Axtel *v.* Chase, 77 Ind. 74, 83 Ind. 546, 554; Fay *v.* Oliver, 20 Vt. 118. *Conf.*, however, Nothe *v.* Nomer, 54 Conn. 326. In Campbell Printing Press, etc. Co. *v.* Marsh, 20 Colo. 22, it was held that one who had received and used a printing press might return it and rescind his contract on the failure of the seller to furnish another piece of machinery included in the bargain, though the market value of the press was impaired by the fact that it had been used. The same principle is necessarily involved in the decisions which allow rescission for breach of warranty. See the following note. In Benson *v.* Cowell, 52 Ia. 137, the plaintiff was allowed to rescind on returning money of which he had had the use, without being required to pay interest.

[3] Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Hoult *v.* Baldwin, 67 Cal. 610 (*conf.* Cal. Civ. Code, § 1786); Sparling *v.* Marks, 86 Ill. 125; Rogers *v.* Hanson, 35 Ia. 283; Upton Mfg. Co. *v.* Huiske, 69 Ia. 557; Craver *v.* Hornburg, 26 Kas. 94; Milliken *v.* Skillings, 89 Me. 180; Franklin *v.* Long, 7 Gill & J. 407; Bryant *v.* Isburgh, 13 Gray, 607; Gilmore *v.* Williams, 162 Mass. 351, 352; Branson *v.* Turner, 77 Mo. 489; Kerr *v.* Emerson, 64 Mo. App. 159; Davis *v.* Hartlerode, 37 Neb. 864; Canham *v.* Plano Mfg. Co., 3 N. Dak. 229 (*conf.* N. Dak. Civ. Code, § 3988); Byers *v.* Chapin, 28 Ohio St. 300; Osborne *v.* Poindexter, (Tex. Civ. App.) 34 S. W. Rep. 299; Warder *v.* Fisher, 48 Wis. 338; Minn. Threshing Co. *v.* Wolfram, 96 Wis. 481; Mader *v.* Jones, 1 Russ. & Chesley (Nova Scotia), 82.

But many states follow the English rule and do not allow rescission for breach of warranty. Thornton *v.* Wynn, 12 Wheat. 183; Trumbull *v.* O'Hara, 71 Conn. 172; Woodruff *v.* Graddy, 91 Ga. 333; Code, Ga. § 3556; Marsh *v.* Lord, 55 Ind. 271; Wulschner *v.* Ward, 115 Ind. 219, 222; Lightburn *v.* Cooper, 1 Dana, 273; Merrick *v.* Wiltse, 3 Minn. 41 (*conf.* Close *v.* Crossland, 47 Minn. 500); Muller *v.* Eno, 14 N. Y. 597; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 269; Freyman *v.* Knecht, 78 Pa. 141; Eshleman *v.* Lightner, 169 Pa. 46; Kauffman Milling Co. *v.* Stuckey, 40 S. C. 110; Hull *v.* Caldwell, 3 S. Dak. 451; Allen *v.* Anderson, 3 Humph. 581; Wright *v.* Davenport, 44 Tex. 164; Matteson *v.* Holt, 45 Vt. 336; Mooers *v.* Gooderham, 14 Ont. 451.

deduction for what he has received and cannot return, and some authorities seem to support such a solution of the problem.[1]

The right of rescission is frequently stated as if it were confined to simple contracts;[2] and it is obvious that it is inconsistent with the early common law doctrines in regard to dissolution of sealed contracts to allow matter *in pais* to afford ground for their rescission. But in many jurisdictions in this country a seal no longer has its common law effect, and it is clear that at least in some jurisdictions where a seal still retains its old importance so far as to make consideration for a promise unnecessary, a contract under seal may be rescinded or avoided for breach of promise by one party at the suit of the other, and a recovery had on a *quantum meruit*. This was so held in Ballou *v.* Billings.[3] Holmes, J., in delivering the opinion of the court, refers to earlier Massachusetts decisions which had decided that a contract under seal might be rescinded by parol, and adds, "Whether these cases would have been decided the same way in earlier times or not, we have no disposition to question them upon this point, and it is going very little further to hold that such a contract may be rescinded if it is repudiated by the other side."[4] In other jurisdictions, however, such relaxation of common law doctrines has not as yet been sanctioned.[5]

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[1] See Keener, Quasi-Contracts, 305; Wilson *v.* Burks, 71 Ga. 862; Todd *v.* Leach, 100 Ga. 227; Brewster *v.* Wooster, 131 N. Y. 473; Mason *v.* Lawing, 10 Lea, 264.

In Higby *v.* Whittaker, 8 Ohio, 198, and Hood *v.* People's, etc. Assoc., 8 Tex., Civ. App. 385, the vendor was allowed to recover land for which he had received part payment without returning what he had received, on the ground that the possession which the vendee had enjoyed equalled in value this part payment. See, also, McDaniel *v.* Gray, 69 Ga. 433; Travelers Ins. Co. *v.* Redfield, 6 Col. App. 190.

[2] See *e. g.* Ankeny *v.* Clark, 148 U. S. 345, 353, quoting from Smith's Leading Cases; Weart *v.* Hoagland's Adm. 2 Zab. 517, 519; Fay *v.* Oliver, 20 Vt. 118, 122; Brown *v.* Ralston, 9 Leigh, 532, 545; Festing *v.* Hunt, 6 Manitoba, 381, 384.

[3] 136 Mass. 307.

[4] This was allowed also in 1803 in Weaver *v.* Bentley, 1 Caines, 47, and see the following note.

[5] Atty *v.* Parish, 1 B. & P., N. R. 104; Middleditch *v.* Ellis, 2 Ex. 623; McManus *v.* Cassidy, 66 Pa. 260. (But see Am. Life Ins. Co. *v.* McAden, 109 Pa. 399.)

Professor Keener, in his excellent work on Quasi-Contracts (p. 308), draws the distinction from the cases cited above in this and the two preceding notes, that where money has been paid by the plaintiff it may be recovered from a defendant who is in default though the contract was under seal, but where services have been rendered or property other than money delivered the plaintiff's only remedy is on the contract, if it is under seal. Possibly the case of Greville *v.* Da Costa, Peake, A. C. 113, taken in connection with the English cases cited above, may lend some support to this view, but the American cases certainly do not seem to warrant the distinction. On the one hand, in Weaver *v.* Bentley, the plaintiff, who had given notes, money, and farm stock, was apparently allowed to recover for the property as well as the money; and later New York cases

A party who has himself been guilty of a substantial breach of contract cannot rescind the contract because of subsequent refusal or failure to perform by the other party.[1]

As rescission is only an alternative remedy, and is in derogation of the contract, a party who wishes to avail himself thereof must manifest his election in some way;[2] and must do so without

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make it evident that the law of that state made no such distinction. See Jewell *v.* Schroeppel, 4 Cow. 564; Allen *v.* Jaquish, 21 Wend. 628. Certainly, also, the court in Ballou *v.* Billings indicate no intention to rest that case on the fact that the plaintiff had paid money instead of rendering services or delivering property, but rather broadly decide that contracts under seal generally may be rescinded or avoided for breach. This was decided, also, in regard to a contract for work and labor in Webster *v.* Enfield, 10 Ill. 298. See, also, Wolf *v.* Schlacks, 67 Ill. App. 117, 118. A dictum by Redfield, J., in Myrick *v.* Slason, 19 Vt. 121, 126, points in the same direction. On the other hand, though the cases where the plaintiff was not allowed to recover were in fact actions for the value of services or property, there is nothing to indicate that the courts so deciding would have treated the plaintiff better had he been suing for money paid. Indeed, a contrary inference seems justified.

[1] Horne *v.* Smith, 27 Ch. D. 89; Kane *v.* Jenkinson, 10 Nat. B. R. 316; Baston *v.* Clifford, 68 Ill. 67; Downey *v.* Riggs, 102 Ia. 88; Getty *v.* Peters, 82 Mich. 661; Green *v.* Green, 9 Cow. 46; Ketchum *v.* Evertson, 13 Johns. 359, 364; Higgins *v.* Eagleton, 155 N. Y. 466; Ashbrook *v.* Hite, 9 Ohio St. 357. See, also, Hickock *v.* Hoyt, 33 Conn. 553; Wilkinson *v.* Blount, 169 Mass. 374. This principle, however, is only accepted with much qualification in many states. The right of one who is himself in default to recover compensation for what he has done is beyond the scope of this article. It is fully treated in Keener on Quasi-Contracts, 214 *et seq.*

[2] Avery *v.* Bowden, 5 E. & B. 714; Reid *v.* Hoskins, 5 E. & B. 729; Cornwall *v.* Henson, L. R. (1900) 2 Ch. 298; Hennessy *v.* Bacon, 137 U. S. 78; Carney *v.* Newberry, 24 Ill. 203; Graham *v.* Holloway, 44 Ill. 385; Mullin *v.* Bloomer, 11 Ia. 360; Supple *v.* Iowa State Ins. Co., 58 Ia. 29; Weeks *v.* Robie, 42 N. H. 316; Swazey *v.* Choate Mfg. Co., 48 N. H. 200; Andrews *v.* Cheney, 62 N. H. 404 (*conf.* Dow *v.* Harkin, 67 N. H. 383); Levy *v.* Loeb, 89 N. Y. 386, 390; Higbee *v.* Whittaker, 8 Ohio, 198; Kirby *v.* Harrison, 2 Ohio St. 326; Phillips *v.* Herndon, 78 Tex. 378.

The way in which election must be manifested may vary in different cases. Formal notice is certainly not always requisite. In Thresher *v.* Stonington Bank, 68 Conn. 201; Graham *v.* Holloway, 44 Ill. 385; Brown *v.* St. Paul, etc. Ry. Co., 36 Minn. 236; Graves *v.* White, 87 N. Y. 463, it was held that bringing an action for restitution promptly was sufficient; and see Kirby *v.* Harrison, 2 Ohio St. 326. In New Hampshire, however, it is held some manifestation of election must precede such an action. See New Hampshire cases cited above. In Texas it is laid down, at least in cases of sales of real estate, that "where there has been part performance by the vendee, as paying a portion of the purchase money or taking possession and making improvements under the contract, he would be entitled to reasonable notice of the vendor's intention to rescind. The reason of this rule is obvious. He may be able to give a reasonable excuse for his failure to fully perform that would entitle him in equity to protection to the extent he had performed. If the vendee has actually abandoned the contract or has so acted as to create the reasonable belief on the part of the vendor that he has abandoned it, the vendor may rescind without notice of his intention, notwithstanding the part performance by the vendee." Kennedy *v.* Embry, 72 Tex. 387, 390.

Where no time is fixed by the contract or where time is not of the essence, the

undue delay.[1] Election once made determines the plaintiff's rights.[2]

There are a few minor inconsistencies in applying or failing to apply the rule allowing restitution as an alternative remedy for breach of contract.[3] These inconsistencies are unfortunate, as they not only are at variance with logical theory, but seem to rest on no adequate foundation of practical convenience. They should, therefore, where it is possible, be swept away by future decisions.

It may seem that the whole doctrine of allowing restitution when an adequate remedy on the contract exists is anomalous;[4] and from a technical point of view this may be so. But the doctrine must have the merit either of practical convenience or of conformity to men's sense of fairness, for the history of the civil law

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injured party may by notice fix a reasonable time after which the contract, if not performed, will be treated as abandoned. Green *v.* Levin, 13 Ch. D. 589; Cover *v.* McLaughlin, 18 N. S. Wales, 107, and decisions collected in 50 Am. Decisions, 678, *n.*

[1] Carney *v.* Newberry, 24 Ill. 203; Axtel *v.* Chase, 77 Ind. 74, 83 Ind. 546, 554; Mills *v.* Osawatomie, 59 Kas. 463; Lawrence *v.* Dale, 3 Johns. Ch. 22; Caswell *v.* Black River Mfg. Co., 14 Johns. 453; North Dakota Civ. Code, § 3934; Oklahoma Stats. § 868; Thomas *v.* McCue, 19 Wash. 287; 74 Am. Dec. 662, *n.*

[2] Goodman *v.* Pocock, 15 Q. B. 576; Routledge *v.* Hislop, 29 L. J. (N. S.) M. 90; Wolff *v.* Pickering, 12 S. C. of Cape of Good Hope, 429. *Conf.* Savage *v.* Canning, Ir. R. 1 C. L. 434.

[3] Thus, one who has sold goods to another, who has agreed to give a bill or note made by himself payable at a future day and who has failed to do so, cannot, it is generally held, recover in *indebitatus assumpsit* the value of the goods delivered until the stipulated period of credit has expired. Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 B. & P. 582; Manton *v.* Gammon, 7 Ill. App. 201 (*conf.* Dunsworth *v.* Wood Machine Co., 29 Ill. App. 23); Carson *v.* Allen, 6 Dana, 395; Hanna *v.* Mills, 21 Wend. 90. Yet the failure to give the promised bill or note is surely a material breach. And so it was held in Stocksdale *v.* Schuyler, 29 N. Y. St. Rep'r, 380 (affd. in 130 N. Y. 674). See, also, Tyson *v.* Doe, 15 Vt. 571; Jaquith *v.* Adams, 60 Vt. 392.

If a bill or note signed by a third person should have been given, the contract may be rescinded on action brought at once.

Again, it has been held that a plaintiff cannot recover the money value of goods or services given to the defendant if by the contract he was to receive not money but goods or services. Harrison *v.* Luke, 14 M. & W. 139 (*conf.* Keys *v.* Harwood, 2 C. B. 905); Anderson *v.* Rice, 20 Ala. 239; Oswald *v.* Godbold, 20 Ala. 811; Eastland *v.* Sparks, 22 Ala. 607; Bernard *v.* Dickins, 22 Ark. 351; Baldwin *v.* Lessner, 8 Ga. 71; Cochran *v.* Tatum, 3 T. B. Mon. 404; Slayton *v.* McDonald, 73 Me. 50; Pierson *v.* Spaulding, 61 Mich. 90; Mitchell *v.* Gile, 12 N. H. 390; Weart *v.* Hoagland's Adm., 2 Zab. 517; Brooks *v.* Scott's Exec., 2 Munf. 344; Bradley *v.* Levy, 5 Wis. 400. But see *contra*, Sullivan *v.* Boley, 24 Fla. 501; Stone *v.* Nichols, 43 Mich. 16; Dikeman *v.* Arnold, 78 Mich. 455; Brown *v.* St. Paul Ry. Co., 36 Minn. 236; Clark *v.* Fairfield, 22 Wend. 522; Way *v.* Wakefield, 7 Vt. 223; Wainwright *v.* Straw, 15 Vt. 215. And see Jackson *v.* Hall, 53 Ill. 440.

[4] Professor Keener so regards it, and finds in the anomalous character of the remedy a reason for some of its illogical limitations. Quasi-Contracts, 306.

shows even more strikingly than that of the common law the development of the doctrine, in spite of ancient rules to the contrary, that a person aggrieved by breach of contract may have rescission and restitution. The Roman law, like the early English law, did not allow this, but it was permitted by the Code Napoléon, and consequently is permitted now not only in France, but in the numerous countries which have copied French legislation. Germany clung longest to the old Roman rule, but in contracts within the commercial code the remedy in question has been authorized since 1861–1868, when a uniform commercial code was gradually adopted by the various German states, and since January 1, 1900, under the Bürgerliches Geretzbuch the remedy is well-nigh uniformly allowable.[1]

The same tendency may be observed in another direction. The Indian Contract Act, though supposed to be generally a codification of contracts, seems to go beyond the law of England in allowing rescission.[2]

*Samuel Williston.*

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[1] See 13 HARVARD LAW REVIEW, 84, 85, 94–95.

[2] Sect. 39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

See, also, sect. 53, which allows rescission because of prevention of performance, and sect. 107, which allows a vendor who has parted with title but retained a lien to make a resale of the goods.

It should be said, however, that the court in Sooltan Chund *v.* Schiller, 4 Calcutta, 252, showed a tendency to restrict the effect of sect. 39.

[To be continued.]